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SUITS BETWEEN THE GOVERNMENTS OF A FEDERATION

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The experience of the High Court of Australia in adjudicating disputes between the governments of the Australian federation has been confined chiefly to disputes arising under the federal Constitution. It is clear nonetheless that the Court's jurisdiction extends to inter-governmental controversies which do not raise constitutional questions. Section 75 of the federal Constitution confers on the Court original jurisdiction "in all matters . . . (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party" and "(iv) Between States". Section 38 of the Judiciary Act, enacted pursuant to s. 77(ii) of the Constitution, makes the Court's jurisdiction in suits between States and suits between the Commonwealth and a State or States, exclusive.

Some suits between governments raise issues of a kind that may arise in litigation between citizen and citizen, or between the Crown and a citizen. Others, for example, disputes over territorial boundaries and over the use of inter-State rivers, bear a much closer resemblance to disputes between sovereign states. It is with the latter class of cases that this article is principally concerned.[1] The main problems which these cases present are whether the particular controversy is justiciable, whether the defendant government is subject to legal liability and what law, if any, is to be applied in deciding the case.

Justiciability

The terms "justiciable" and "non-justiciable" are not terms of art. I shall use "non-justiciable" here to refer to a conclusion that a dispute or an issue arising in the course of a dispute is not capable of judicial determination.

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[1] See generally W. Harrison Moore in "Suits between the Commonwealth and State and State" (1925) 7 *J. Comp. Leg.* (3rd ser.) 155; "The Federation and Suits between Governments" (1935) 17 *id.* 163; J. B. Scott (ed.), *Judicial Settlement of Controversies between States of the American Union* (1918); R. G. Caldwell, "The Settlement of Interstate Disputes" (1920) 14 *A.J.I.L.* 38; W. S. Barnes, "Suits between States in the Supreme Court" (1954) 7 *Vanderbilt L.R.* 494; W. G. Rice, "States as Suitors in Interstate Litigation in the Supreme Court" in R. Pound *et al.*, *Perspectives of Law: Essays for A. W. Scott* (1964) 318.

Such a conclusion may be reached for a variety of reasons. The court which rules on the question of justiciability may decide that it has no authority to decide the case, that is to say, has no jurisdiction, either in relation to the parties, the subject-matter, or the rules applicable to the dispute — if any. Alternatively the court may decide that although it has jurisdiction in respect of the class of cases of which the present is one, there is some legal principle which either requires or permits it not to exercise jurisdiction in the particular case, or which prohibits it from deciding a certain issue raised therein. The line separating refusals to adjudicate on the ground of want of jurisdiction and refusals to adjudicate on non-jurisdictional grounds is blurred, but need not be pursued here.[2] It is sufficient to say that the justiciability of disputes between the governments of the federation raises jurisdictional questions — and I include here questions regarding the ambit of the judicial power of the Commonwealth — and questions concerning the propriety of adjudication as a means of resolving controversies.

The High Court of Australia cannot decline jurisdiction merely because the parties to the dispute are governments of the federation or because the defendant government resists a judicial settlement. The jurisdiction of international tribunals depends on the voluntary submission of the parties to the exercise of jurisdiction, but the jurisdiction of the High Court is obligatory. On the other hand, s. 75 of the federal Constitution, as judicially interpreted, does not require or authorize the Court to decide every controversy between States or between a State or States and the Commonwealth that is brought before it. In *South Australia* v. *Victoria*,[3] a case of disputed boundaries, it was stressed that the jurisdiction which s. 75 of the Constitution confers is jurisdicition in enumerated "matters". Members of the Court fastened on to this entirely neutral term as a basis for limiting the range of controversies they would entertain. "The word 'matters' ", Griffith, C.J. observed, "was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice."[4] His view was that "a matter between States in order to be justiciable, must be such that a controversy of a like nature could arise between individual persons, and must be such that it can be determined upon principles of law".[5] O'Connor, J. thought that "the generality of the word matters" was cut down by s. 71 of the Constitution, the section vesting the judicial power of the Commonwealth in the High Court and in certain other courts. "Matters" must therefore be read as meaning "matters capable of judicial determination"; and the matter in dispute must "be such that it can be determined on some recognized principle of law".[6] According to Isaacs, J., "matters used with reference to the judicature, and applying equally to individuals and States includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject and which therefore governs their relations, and constitutes the measure of their respective rights and duties".[7] Higgins, J. expressed his

[2] On the question of justiciability see G. Marshall, "Justiciability" in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (1961) 265; R. S. Summers, "Justiciability" (1963) 26 *Mod. L.R.* 530; L. L. Fuller, "Adjudication and the Rule of Law" (1960) 54 *Proc. Am. Soc. Int. L.* 1.
[3] (1911) 12 C.L.R. 667.
[4] *Id.* at 667.
[5] *Ibid.*
[6] *Id.* 708.
[7] *Id.* 715.

conception of "a matter between States" by saying: "Under the Constitution, it is our duty to give relief as between States in cases where, if the facts had occurred between private persons, we could give relief on principles of law; but not otherwise."[8] The several opinions in this case on the meaning of "matters" were cited with approval by the High Court in *Re Judiciary and Navigation Acts*.[9] "A matter under the judicature provisions of the Constitution must," the Court said on that occasion, "involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law."[10]

These judicial pronouncements on what is required for a "matter" to exist within the meaning of s. 75 of the Constitution seem to admit the possibility of the High Court declaring a *non liquet*, that is to say, declining to adjudicate a controversy on the ground that there are no applicable legal rules by which it could be determined. The fact that the Court has treated the term "matters" as implying some limitation in its own authority — on its judicial power — does not negate such an inference, for if the Court were to declare a *non liquet*, it could only be on the ground that the Constitution did not authorize it to decide a controversy for which there was no applicable rule of law. But to admit the possibility of a *non liquet*, as the Court appears to have done, may be to deny that the court possesses even that limited law-making competence which judges ordinarily exercise in a common law system. In such a system it is virtually unknown for a court to decline jurisdiction on the ground that there is no applicable law. Occasionally a judge may acknowledge that there is no legislation or decisional law which obliges him to come to one conclusion rather than another, but in saying this, he is saying no more than that there is some leeway in the choice of the governing rule. The system authorizes him to adopt a rule for decision of the case before him, though it controls his choice by requiring that the rule he adopts shall be framed with reference to rules previously applied in similar cases, shall be reconcileable with those rules and not inconsistent with valid legislation.

If a court has been empowered by statute to determine disputes between governments and if the statute does not provide an exhaustive set of rules by which disputes between those governments might be decided, then in the unprovided for case — the case not covered by statutory rules and for which no precedent can be found in previous judicial decisions — the court might be tempted to declare a *non liquet*. Whether the High Court would ever do so openly is doubtful, for despite its insistence that its power to decide depends on the existence of antecedent rules of law which are applicable to the case before it, and despite the admission of the possibility of a *non liquet*, it has shown no disinclination to "make" law on inter-governmental relations, in part out of the fabric of decisional law created for private parties. Although there may be circumstances in which the Court thinks it is unwise or improper for it to decide certain issues presented to it for determination, it is not impossible for it to avoid adjudication on these issues without invoking *non liquet*, and, as will be shown presently, it may sometimes achieve this result by applying legal rules which in effect stipulate that the

[8] *Id.* 742.
[9] (1921) 29 C.L.R. 257. See also *Dominion of Canada* v. *Province of Ontario* (1910) A.C. 637 at 645.
[10] 29 C.L.R. 257 at 260.

parties shall resolve any dispute between them without recourse to litigation. Whether or not a certain kind of controversy ought to be decided by a court of law is a matter of judicial policy. Factors relevant to this policy question include the efficacy of the type of remedy sought, the likelihood of the defendant government accepting the court's judgment, the wisdom of subjecting intergovernmental relations of the kind in question to a regime of legal rules, the suitability of the adversary process as a framework for settlement of the dispute and the availability of other methods of dispute settlement. In suits between the governments of the Australian federation, normally no more is sought than a declaration of rights. The apparent willingness of governments to accept and act upon judicial declarations may afford some encouragement to the judiciary not to draw the bounds of justiciability over-restrictively. Nevertheless it has to be borne in mind that the High Court's jurisdiction in matters between governments is not dependent on the defendant government having voluntarily submitted to the exercise of jurisdiction. When governments are not at liberty to decline judicial settlement, the judiciary may well take the view that out-of-court settlements ought to be fostered and to that end may prefer to limit the range of disputes that are deemed capable of judicial determination. The shortcomings of the adversary process as a means of settling disputes between governments are particularly evident when the controversy is part of a larger competition for political power. In that case, disposition of the dispute in the judicial forum may impede settlement by political compromise, and exacerbate what may already be strained relations between the governments concerned. The adversary framework within which court proceedings take place often accentuates the differences between the parties; rather than providing an environment conducive to mutual accommodation of claims, it forces the contestants to adopt positions and press every advantage to the point where the court must adjudge one party to be the victor, the other the loser. The Court may be able to avoid decision on the substantial issues in dispute and thereby compel the parties to resolve their differences by negotiation, but it cannot itself perform a truly mediatory function nor move the parties to accept a final concord which eliminates the notion that one has won and the other has lost. Frankfurter, J. once expressed grave doubts about the "efficacy of the adjudicatory process in the adjustment of interstate controversies." The "episodic character" of litigation, he observed, "its necessarily restricted scope of enquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors — often denature and even mutilate the actualities of the problem and thereby render the litigious process unsuited for its solution".[11]

Neither the High Court of Australia nor the Supreme Court of the United States can decline to exercise jurisdiction because the parties to a case happen to be States because the federal Constitutions in each instance specifically refer to cases of this kind as cases within the Court's jurisdiction. Judicial settlement of such cases can be avoided only by invoking principles concerning the nature and extent of the decision-making power invested in the Court, principles which though actually founded on considered judicial policy, are presented as principles implicit in the constitutional text.

[11] *Texas* v. *White* 306 U.S. 398 at 428 (1939).

Inter-Colonial Disputes

In *South Australia* v. *Victoria* O'Connor, J. ventured the opinion that Article III of the United States Constitution, which gave the Supreme Court authority to decide "controversies between two or more States", authorized the Court to decide questions which he himself would not have regarded as justiciable.[12] Why he believed that the High Court's jurisdiction in "matters" between States was more limited than that of the American Supreme Court in controversies between States he did not explain. If his supposition was correct, the basis for it could not have been that the draftsman of the Australian Constitution conceived that the word "matters" would draw the bounds of the High Court's jurisdiction more narrowly. In the draft Constitution approved by the 1891 Convention, the phrase was "controversies between States". At the Adelaide Convention, the Judiciary Committee changed the wording to "matters", not with the object of restricting jurisdiction, but in order to ensure that every possible judicial procedure that could arise under s. 75 would be embraced. When it was asked at the Melbourne Convention whether the term might be wide enough to cover advisory opinions, the Chairman of the Committee, J. H. Symon, replied by saying:

> The word "matters" merely indicates the scope within which the judicial power is to be exercised, but no matter can be dealt with until it comes before the authorities in the form of a case or some judicial process which will be regulated by the Judiciary Acts.

At no time was there any suggestion that the judicial power of the United States Supreme Court with respect to controversies between States was any wider than that which would be exercisable by the High Court in like cases. Nor was there any suggestion that the High Court's jurisdiction in these cases would be affected by the fact that the political status of the federating Australian colonies was different from that of the States which were joined in the American federal union, or by the fact that in the Empire there were already institutions and procedures for the settlement of disputes between governments.

What relevance, if any, did the differences between the Australian and American situations have to the High Court's assessment of the limits of its jurisdiction? Before attempting to answer this question, it is necessary to enquire into the history of the corresponding clause of the United States Constitution and the bearing which these antecedents have had on the judicial interpretation of the clause.

Before the American colonies declared their independence of Great Britain, disputes between them — mostly disputes over their boundaries — were submitted to the Privy Council for resolution. Disputes were pending before the Privy Council on the eve of independence and were still undetermined when the Articles of Confederation were being considered. To fill the vacancy left by elimination of the Privy Council's authority, the Articles of Confederation made provision for a special tribunal to adjudicate disputes between the States. The judges of the tribunal were to be drawn by lot from a list supplied by the litigant State, but if this State omitted to nominate a panel, appointments were to be made by Congress. The scheme, White, C.J. explained in *Virginia* v. *West Virginia*,[13] "proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution.

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[12] *Supra* n. 3 at 708-9.
[13] 246 U.S. 565 at 598-99 (1917).

. . . That this absence of power to control the governmental attributes of the States for the purpose of enforcing findings concerning disputes between them gave rise to the most serious consequences and brought the States to the very verge of physical struggle and resulted in the shedding of blood, and would, if it had not been for the adoption of the Constitution of the States, it may be reasonably assumed, have rendered nugatory the great results of the Revolution." The Constitutional Convention unanimously adopted Virginia's proposal that compulsory jurisdiction with respect to the settlement of inter-State disputes be vested in the Supreme Court. "The conferring on this court," White, C.J. observed,[14] "of original jurisdiction over controversies between States, the taking away of all authority as to war and armies from the States [Art. 1, s. 10], and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress [Art. 1, s. 10], at once makes clear how completely the past infirmities of power were in mind and were provided against." The Constitution, Bradley J. said in *Hans* v. *Louisiana*,[15] made justiciable certain things "which were not known as such at common law — such, for example, as controversies between States as to boundary lines and other questions admitting of judicial solution." Fuller, C.J.'s view of the effect of the Constitution was much the same.[16] "As the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, were made justiciable by that instrument."[17]

The need for an Australian tribunal to settle disputes between States was not perhaps as urgent as it had been in America. At the time of federation, the Australian colonies were not, unlike the federating American States, sovereign, independent nations. They did not exercise independent treaty making powers nor did their Governors exercise the royal prerogatives in relation to war. No Australian equivalent of the first and third clauses of s. 10 of Article I of the United States Constitution was therefore necessary. More important, there was still a possibility that disputes between the federating colonies and maybe between the Commonwealth and a State or States could be referred to the Privy Council or to its Judicial Committee for resolution. If that were the case, the High Court of Australia might have taken the view that it could properly confine its jurisdiction in matters between the governments of the federation to those disputes of a "strictly legal" character and could leave any other disputes to be determined by the Imperial tribunal. On the other hand, it could just as easily have interpreted the Constitution as having conferred on the High Court jurisdiction similar to that which the Privy Council had exercised, so that whenever a dispute arose between States, the test of justiciability would be whether it was a dispute of a kind which before federation might have been entertained by the Privy Council or by its Judicial Committee.

In *South Australia* v. *Victoria*, the High Court looked to the Privy Council experience for guidance on the question whether a dispute between

[14] *Id.* 599.
[15] 134 U.S. 1 at 15 (1890).
[16] *Kansas* v. *Colorado* 185 U.S. 125 at 141 (1901).
[17] See also *Rhode Island* v. *Massachusetts* 37 U.S. (12 Pet.) 657 at 726 (1838); *Missouri* v. *Illinois* 180 U.S. 208 (1901).

States over the location of their land boundaries was a justiciable issue. There were precedents for the decision of such issues by the Privy Council, but the judges of the High Court were divided on whether the Privy Council's determinations were really made in exercise of judicial power. Griffith, C.J., with whom Barton, J. concurred, took the view that "the jurisdiction exercised by the Sovereign" in these cases "was political and not judicial, and that the Dependency petitioning for redress did not invoke the exercise of the judicial power of the realm".[18] The jurisdiction was political, he thought, because in its exercise "the Sovereign was guided by general rules of justice and good conscience, and not by any formal rules of law such as can be invoked by a suitor who has a right to redress recognized by law".[19] Later on he stated: "This conclusion is strongly supported by the circumstance that in the cases referred to the Judicial Committee during the nineteenth century lay Lords sat on the Committee; and that no formal judgment was delivered."[20] The Chief Justice offered no convincing evidence in support of his assertion that the Committee of the Council for Trade and Plantations, to whom colonial boundary cases were referred, was not guided by formal rules of law. He apparently was unaware of the fact that in the eighteenth century the exercise of original jurisdiction was rare and that the normal practice was to refer boundary disputes to royal commissions with liberty to appeal to the Privy Council reserved.[21]

Isaacs, J. thought there was no basis at all for supposing that the sovereign's jurisdiction to settle inter-colonial boundary disputes was always political. Lord Hardwicke's opinion in *Penn* v. *Lord Baltimore*[22] "was that the King and Council had jurisdiction to judge as a judicial tribunal of the controversy, even where the King himself was one of the parties. . . . Reference to the Order in Council of 16th May, 1735, when Lord Hardwicke himself was present, shows that the King ordered that the consideration of the report of the Committee of the Council for Plantation Affairs should be adjourned that John Thomas and Richard Penn might have an opportunity to proceed in a Court of Equity to obtain relief on the articles of agreement insisted by them, with liberty to apply to the Plantation Committee as the nature of the case might require. This is the language of a Court, not of a mere political body exercising purely political functions."[23]

In his *Harvard Law Review* article on "Sovereign Colonies", Thomas Baty concluded that suits between colonies before the Privy Council could not

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[18] *Supra* n. 3 at 705.
[19] *Id.* 704-5.
[20] *Id.* 705.
[21] The original jurisdicition of the Privy Council was rarely exercised during the American colonial period. The most usual method by which inter-colonial boundary disputes were settled was by appointment of royal commissioners with a reservation of jurisdiction to entertain an appeal from the commissioners' findings. In the *Mohegan Case* (1704), the issue of royal commissions for the settlement of colonial boundary disputes was explained as an exercise of the royal prerogative to erect colonial courts — Opinion of Attorney-General Northey, *Calendar of State Papers, Colonial, 1702-03*, par. 58, 146. Like courts, boundary commissioners were empowered by commission to hear and determine, though according to justice and equity. It should be added that there were a number of boundary disputes that were settled without recourse either to the Privy Council's original jurisdiction or to royal commissions. At least one was settled by a colonial statute confirmed by the King in Council, while others were settled by colonial agreements ratified by the King in Council: see J. H. Smith, *Appeals to the Privy Council from the American Plantations* (1950) 419, n. 7.
[22] (1750) 1 Ves. Sen. 444 at 447.
[23] *Supra* n. 3 at 718.

be regarded as judicial because the parties lacked juristic personality.[24] "The government of the colony," he wrote, "is simply the King acting by a particular set of agents. The suit of a colony by another colony would be like the suit of the cook by the butler because too much was spent on coals, or the suit of the War Office by the Board of Agriculture because men who might be soldiers were kept to work at the harvest."[25] He quoted with approval Harrison Moore's statement that the "adjustment of interests as between the different parties of the Empire is in general not a matter for the consideration of the Court".

But one thing Baty appears to have overlooked is that a number of the colonial boundary disputes of the seventeenth and eighteenth centuries were not between royal colonies but between proprietary and chartered colonies. There was nothing anomalous about suits between proprietors and corporations. Would there have been anything anomalous about the Privy Council according the governments of royal colonies standing to sue before the Council itself or before an *ad hoc* royal commission?[26] Arguments based upon the supposed indivisibility of the Crown throughout the dominions do not, I think, dispose of the question whether the authority exercised by the Privy Council in relation to colonial boundary disputes was judicial in character. The Privy Council proceeded as though the parties in dispute were separate legal entities and in most cases followed judicial-type procedures.

Even if the original jurisdiction exercised by the Privy Council and the *ad hoc* boundary commissions is regarded as judicial in character, it does not follow that the type of questions they decided should be regarded as questions the High Court should decide in exercise of s. 75 jurisdiction. The royal prerogatives in relation to the King's dominions beyond the seas were not exclusively judicial, and neither was the business of the Privy

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[24] (1921) 34 *Harvard L.R.* 837 at 846-47.

[25] *Id.* 846.

[26] The exercise of original jurisdiction in those cases where the parties were colonial proprietors seems to have been regarded as an extension by analogy of the feudal doctrine which made the King's Court the court for adjudication of disputes between tenants in chief. As Attorney-General, Philip Yorke questioned whether the Privy Council had jurisdiction to decide the boundary dispute between the Penn and Baltimore proprietaries (see Smith, *op. cit. supra* n. 21 at 419-420), but he apparently revised his opinion at a later stage, for as Lord Hardwicke he is reported to have said in relation to the same case: "This is a question between feudatory Lords, proprietors of provinces: And concerning not only their private interest, but the rights of governments and the rights of private persons, and has been well compared to the case of the Lords marchers. If a private question arose between tenants there, it was determined in the court of the marchers, on which a writ of error lay in the King's Bench, being dependent on the Crown of England; and on that account, all disputes between Lords marchers were determined originally in the King's Bench, as the place where the writs of error in private affairs lay. So here the disputes of private persons in the provinces are determined in the courts of the province, on which a writ of error by way of appeal lies to the King in Council. Therefore questions between proprietory lords, in analogy to the ancient law of the marchers must be determined before the King in Council, and always is so, notwithstanding the statute of 16 Charles I which restrains the power and jurisdiction of the Privy Council." *Penn* v. *Lord Baltimore* (1745) Ridgeway, Cases, temp. Hardwicke, 332, 334-35; see also *Penn* v. *Lord Baltimore, supra* n. 22, at 446-47; *Earl of Derby* v. *Duke of Athol* (1749) 1 Ves. Sen. 202; *Bishop of Sodor and Man* v. *Earl of Derby* (1751) 2 Ves. Sen. 337; 1 *Bl. Comm.* 231. The analogy of feudal jurisdiction was more remote when the parties to the dispute were corporations holding under royal charter and remoter still when the colonies were royal or Crown colonies, governed directly by the Crown through a colonial Governor. Lord Hardwicke's remarks were specifically directed to the situation of proprietary colonies. Lord Mansfield, on the other hand, drew no distinction between proprietary and other colonies when in *Fabrigas* v. *Mostyn* he noted that "wherever there is a question between two provinces in America, it must be tried in England by analogy to what was done with respect to the seignories in Wales being tried in English counties". (1774) 20 St. Tr. 82, 230.

Council. Had the High Court been minded to look to Imperial precedent and practice for guidance in delimiting its judicial power, its attention would more properly have been directed to the Judicial Committee of the Privy Council. The Judicial Committee Act, 1833 (3 & 4 Will. IV, c. 41) did not affect the scope of the royal judicial prerogative, but merely regulated the manner of its exercise in appeals from colonial courts. In addition the Act empowered the sovereign to refer to the Judicial Committee "for hearing or consideration any such other matters whatsoever [i.e. matters other than appeals] as His Majesty shall think fit" (s. 4). The Committee was directed to "hear and consider" that matter and to advise His Majesty thereon. This provision empowers the sovereign to refer any matter at all to the Committee: it need not be a dispute of any kind, and even if it is a dispute, it need not be a justiciable one.[27] Section 4, it should be noted, does not prevent the sovereign from referring matters falling within the section to bodies other than the Judicial Committee. Such matters may be referred to a general committee of the Privy Council or to a mixed committee consisting of some members of the Judicial Committee and some others.[28]

In *South Australia* v. *Victoria*,[29] Griffith, C.J. expressed the opinion that the royal prerogative to settle colonial boundary disputes, so far as it related to self-governing dominions, had fallen into abeyance.[30] After the American revolution it had not been exercised until the mid nineteenth century when the *Cape Breton Case* was referred to the Judicial Committee.[31] *The Cape Breton Case* was followed by the *Pental Island Case* of 1872 between New South Wales and Victoria and by the *Manitoba and Ontario Boundary Case* in 1886. All cases were referred to the Judicial Committee, the last two by consent of the parties. "It is possible," the Chief Justice observed, that the prerogative "was exercised *per incuriam*. In the *Ontario and Manitoba Case* the Judicial Committee reported that it was 'desirable and expedient' that the boundary of which they recommended the adoption should be declared by an Act of the Imperial Parliament. (It was so declared by 52 & 53 Vict., c. 28.) This, I think, should be regarded rather as an expression of opinion that the Prerogative, if it still existed, should not be exercised as between self-governing Dependencies than as an expression of opinion as to its continued existence."[32] The boundary dispute between South Australia and Victoria had itself been referred to the British Government. The British Government declined to advise the sovereign to refer the case to the Judicial Committee except on the joint request of the two colonies. The despatch of the Secretary of State, Lord Ripon (September 19, 1894) "may be taken," Griffith, C.J. said, "as a definite expression of opinion that the Prerogative so freely exercised in the 18th century ought not, in the existing conditions

[27] Though according to Sir Kenneth Roberts-Wray, "in practice, questions dealt with under this section [s. 4] would be justiciable" (*Commonwealth and Colonial Law* (1966) 448). See also Alpheus Todd, *Parliamentary Government in the British Colonies* (1880) 221; speech of Sir George Jessell, Solicitor-General, 209 *Hansard* 984.

[28] *Re the States of Jersey* (1853) 9 Moo. P.C. 185, 186; *D'Allain* v. *Le Breton* (1857) 11 Moo. P.C. 64, 70, 75.

[29] *Supra* n. 3.

[30] *Id.* 703.

[31] (1846) 5 Moo. P.C. 259. Actually that dispute was not between colonies. Proceedings were taken by individuals to have effect given to provisions made by the Crown in 1784 for the summoning of a separate assembly for Cape Breton. Cape Breton, which had been captured from the French in 1763, had been annexed to Nova Scotia. A question to be decided was therefore whether Cape Breton had a separate existence.

[32] *Supra* n. 3 at 703.

of the self-governing Dependencies, to be exercised without the consent of the Dependencies concerned. The Prerogative may, therefore, I think be regarded as having then fallen into abeyance, and as no longer affording a practicable means of solution of such difficulties."[33]

Isaacs, J. who, it will be recalled, characterized the prerogative as judicial, thought that the King in Council retained concurrent jurisdiction with the High Court to settle inter-colonial boundary disputes.[34] But if, as Victoria contended, the prerogative consisted of a political jurisdiction, he would have been "prepared to hold that its operation had long ceased with regard to the States of this Commonwealth".[35]

In result, the High Court's recourse to history seems to have helped little in deciding whether or not the dispute before it was one of which the court could or should take cognisance. Griffith, C.J.'s conclusion that the Privy Council's authority to decide inter-colonial disputes was defunct may have been a factor which moved him to the conclusion that the Court ought to decide the dispute before it. But in deciding that dispute, the Court was not, in his view, simply exercising jurisdiction vacated by the Privy Council; the Privy Council's jurisdiction had not involved an exercise of judicial power, whereas the High Court must, consistently with the Constitution, decide according to recognized principles of law. Isaacs, J. disagreed with Griffith, C.J. both on the nature of the Privy Council's jurisdiction and on its continued existence. The fact that its jurisdiction was judicial was a reason for treating the present dispute as a justiciable one. On the other hand, the fact that the Privy Council might still adjudicate the dispute was no reason for the High Court refusing to take cognisance of it. Despite their disagreement over the nature and extent of the Privy Council's jurisdiction, the majority were agreed that the dispute before them was capable of being decided according to antecedent rules of law. The law applied in the case will be discussed at a later stage in this article.

Intergovernmental Agreements

Disputes over agreements between States or between the Commonwealth and a State or States are held to be justiciable according to whether the agreement in question is one creating legal rights and obligations. Whether or not such an agreement does create a legally binding contract is a question for the Court to decide and in deciding it, the Court purports to be applying rules of law. These rules express the Court's judgment on what kinds of issues are appropriate for judicial determination.

Cases in which the High Court has had to consider the legal effect, if any, of agreements between governments have been few. *John Cooke and Co. Pty. Ltd.* v. *The Commonwealth*[36] concerned an agreement entered into in 1916 whereby the Imperial Government agreed with the Commonwealth Government to purchase the Australian wool clip at the rate of 15½d. per pound of greasy wool, plus handling charges, and to pay to the Commonwealth Government one half of the profits derived from the sale of wool for non-military purposes. It was left to the Commonwealth Government to settle with wool growers the terms on which the proceeds of sales to Great Britain

[33] *Ibid.*
[34] *Id.* 721.
[35] *Id.* 719.
[36] (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269.

and of the Australian share in profits obtained on resale would be distributed. The question for decision was whether by virtue of the intergovernmental agreement, the plaintiff woolgrowers were legally entitled to share in the fund established by the Commonwealth out of the moneys received under the agreement. In the High Court it was held that there was no legal (that is, contractual) relationship between the plaintiffs and the Commonwealth. How far that conclusion depended on a finding that the arrangement between the two governments was purely political is unclear. Knox, C.J., and Gavan Duffy and Starke, JJ. accepted the contention of Mr. Owen Dixon, counsel for the Commonwealth, that the agreement was "not cognizable by courts of law, creating no legal rights and duties and depending entirely for its performance upon the constitutional relationship between these Governments and their good faith towards each other. The Imperial Government was not addressing itself, again to use the very language of the learned counsel, to a mercantile agent; it was addressing itself to a political power, a political entity, with coercive powers available to it, and was requesting that body to perform a service for it by the exercise, if necessary, of every power that was available to it."[37] Later on, their Honours observed that "the character of the negotiators, the circumstances under which and the purposes for which the wool was required, the steps that might have become necessary in the acquisition of the wool, all these factors stamp the nature of the arrangement; they exclude it from the region of contract, and establish it as an arrangement of a political character forced upon the two Governments by reason of the War and necessary for military purposes".[38] The Privy Council, which affirmed the High Court's decision, concluded without explanation that the agreement between the governments was "not enforceable by any Court".[39] This observation cannot be taken to mean that an agreement between governments can never be enforceable. In deciding whether or not an agreement creates legally binding obligations, the fact that one or both the parties are governments is only one consideration. The decisive consideration in the *John Cooke Case* seems to have been that in order to fulfil its undertakings, the Commonwealth government might have found it necessary to exercise powers which were distinctively and exclusively governmental, that is to say, powers not exercisable by private persons except by virtue of governmental authorization.

In *South Australia* v. *The Commonwealth* (the *Rail Standardization Case*)[40] the State of South Australia sued for a declaration that a Commonwealth-State agreement was binding and that the Commonwealth had breached the agreement. In 1907 the Commonwealth entered into an agreement with South Australia whereby the Commonwealth agreed to construct or cause to be constructed a railway line extending from Port Darwin to the northern boundary of South Australia. Under the Rail Standardization Agreement of 1949, the South Australian Government agreed to convert the State railways system to standard gauge (clause 5), while the Commonwealth agreed to construct

[37] 31 C.L.R. 394 at 416.
[38] *Id.* 418.
[39] 34 C.L.R. 269 at 280. The doctrine that political agreements are not justiciable in municipal courts dates back to at least the end of the 18th century. In *Nabob of the Carnatic* v. *East India Company* (1791) 1 Ves. Jun. 371, 2 Ves. Jun. 56, an agreement whereby the Nabob assigned certain districts to the Company as security for a debt was characterized as similar to one between two sovereigns; political rather than mercantile in character and therefore not the subject of municipal jurisdiction. The fact that the Company was a subject of the British sovereign was treated for this purpose as immaterial.
[40] (1962) 108 C.L.R. 130.

and convert to standard gauge the railway line from Port Augusta to Darwin (clause 21). The Commonwealth further agreed to finance all the works, but three tenths of the cost of the works to be undertaken by the State were ultimately to be borne by the State. Any question regarding the order in which standardization works were to be undertaken or the time works were to be commenced was to be determined by agreement between the parties. If the parties failed to agree, the matter in dispute was to be decided by the federal Minister for Transport in agreement with the State Minister of Railways. South Australia claimed that although the State had converted the South Eastern Division of the railways and although the Commonwealth had standardized the line from Port Augusta to Alice Springs, the Commonwealth had refused to take those steps that would permit the State to proceed with standardization of the line in the Peterborough Division of South Australia. The State sought a declaration that the 1949 Agreement was valid and binding and that in refusing to proceed, the Commonwealth was in breach of the Agreement.

The High Court was unanimous in upholding the Commonwealth's demurrer to the State's statement of claim. Three judges, Taylor, Owen and Windeyer, JJ., were of the view that the terms of the agreement showed merely an intention to make an agreement in the future, and such an arrangement, on general principles of contract, did not give rise to legally binding obligations.[41] According to Dixon, C.J., Kitto, Menzies and Windeyer, JJ. the Commonwealth had not been guilty of breach of the Agreement since the Agreement did not stipulate when work by the Commonwealth was to begin.[42] Dixon, C.J., Kitto and Menzies, JJ. agreed that performance by one party of the undertakings assumed under the agreement would give rise to legally enforceable obligations on the other,[43] however Dixon, C.J., with whom Kitto, J. concurred, stressed that only some of the provisions would be so enforceable.[44] Only three judges, McTiernan, Taylor and Windeyer, JJ. were prepared to characterize the whole Agreement as a political arrangement which in no circumstances would be judicially enforceable. McTiernan and Windeyer, JJ. treated the political character of the Agreement as depending primarily on the presumed intention of the parties. Contractual relationships, they said, may exist between the Commonwealth and the States, but for a contract to come into being there must be an intention to create judicially enforceable obligations.[45] In the present case, McTiernan, J. reasoned, the carrying out of the works "is a matter of governmental policy. The promises on either side are of a political nature, and both parties would understand at the time the agreements were made, that this was the true nature of the promises. Their performance necessarily requires executive and further parliamentary action. It is not contemplated by either agreement that its performance could ever be the subject of judicial order."[46] The circumstances to be taken into account in determining whether the parties intended "to subject their agreement to the adjudication of the courts," Windeyer, J. said, included "the status of the parties, their relationship to one another, the topics with which the agreement

[41] *Id.* 149-150, 153-54, 157.
[42] *Id.* 146-47, 149, 150, 153.
[43] *Id.* 141, 149, 150.
[44] *Id.* 141, 149.
[45] *Id.* 153-54, 148-49.
[46] *Id.* 149.

deals, the extent to which it is expressed to be finally definitive of their concurrence, the way it came into existence."[47] His Honour did not explain why, apart from the fact that it did not state when any particular work was to be begun or the order in which works were to be carried out, the Rail Standardization Agreement might fall into the political category.

Owen and Menzies, JJ. expressed no firm opinion on whether the Agreement was a political one, though Menzies, J. was inclined to think that it was.[48] What gave it this character was the inclusion of provisions "contemplating further agreements".[49] Dixon, C.J. (Kitto, J. concurring), on the other hand, thought that the Agreement contained mixed obligations, some of which were judicially enforceable, some of which were not. And because of the mixture of political and non-political obligations, it was impossible for the Court to make a declaration in the unqualified terms sought by the State that the Agreements of 1907 and 1949 were valid and subsisting agreements creating contractual obligations.[50]

The *Rail Standardization Case* does not, I think, establish very clear criteria for deciding on which side of the line a particular agreement between governments falls. To say, as did Dixon, C.J., that it is not for the courts to consider "undertakings or obligations depending entirely on political sanctions"[51] begs the question, and to say that an undertaking or obligation is enforceable only by political sanctions is to say no more than that it is not of a kind that the courts will recognize and enforce. The intention-to-create-legal-relations test is no more satisfactory, for to say that there is no legally binding contract because there is no such intention is merely to express a conclusion which may or may not proceed from the application of defined criteria.

In the cases discussed so far, several factors have been mentioned as being relevant to the question of whether an agreement is a political one or one intended to give rise to legal obligations. In the *Rail Standardization Case*, Windeyer, J. mentioned the status of the parties.[52] The fact that both parties to an agreement are governments can never be decisive if only for the reason that the Constitution abrogates sovereign immunity from suit in relation to suits between the States and to suits between the States and the Commonwealth. The rights and duties of the Commonwealth and the States "at least so far as they can be referred to some legal standard are", it has been said,[53] "justiciable". Relevance has also been attached to the nature of the undertakings. In *P. J. Magennis Pty. Ltd.* v. *The Commonwealth*[54] Dixon, C.J. held that a Commonwealth-State War Service Settlement Agreement under which the Commonwealth agreed to pay part of the cost to the State of compulsorily acquiring land for settlement of veterans was not "a definitive contract enforceable at law" because it merely settled "the broad outlines of an administrative and financial scheme". In the *Rail Standardization Case*, he quoted with approval Harrison Moore's opinion that no contract could

[47] *Id.* 154.
[48] *Id.* 150.
[49] *Ibid.*
[50] *Id.* 141, 148.
[51] *Id.* 141.
[52] *Id.* 154.
[53] *New South Wales* v. *The Commonwealth* [*No. 1*] (1932) 46 C.L.R. 155 at 185.
[54] (1949) 80 C.L.R. 382 at 409.

arise from agreements to exercise political power.[55] The main consideration which appears to have moved McTiernan, J. to hold that the Rail Standardization Agreement was not intended to create legal obligations was that performance of the parties' undertakings "necessarily requires executive and further parliamentary action".[56]

There must be very few intergovernmental agreements the performance of which does not require the exercise of peculiarly governmental powers by at least one of the parties. If, for example, one government agreed to buy goods from another, payment of the purchase price by the purchasing government would be illegal unless sanctioned by parliamentary appropriation. Yet it is clear that had the agreement been for the purchase of goods from a private party, there would have been a binding contract notwithstanding that payment of the purchase money had not been sanctioned by Parliament.[57] Should the fact that the seller is another government alter the situation? I can see no reason why it should.

When the agreement is one the performance of which requires the enactment of legislation (other than parliamentary appropriation), other considerations operate. It is clear that no court of law will command the exercise of legislative discretion in a particular way. The suggestion in *Virginia* v. *West Virginia*[58] that the United States Supreme Court might issue a writ of mandamus to compel one State to levy a tax to raise money for payment of a debt to another State seemed to Starke, J. to "savour too much of the exercise of the political power to be within the province of the judicial department".[59] Whether or not a court would award damages against a government for breach of agreement when the breach consisted of non-exercise of legislative powers or exercise of such powers contrary to the terms of the agreement is debatable. I doubt whether any court would be prepared to award any remedy for breach of agreement if the effect would be to fetter or inhibit legislative discretion. The question is whether a damages award or the mere possibility of such an award would have that effect.

If damages were awarded against a government for breach of contract in not legislating in accordance with the agreement, no judgment debt would be enforceable against it until the Parliament had appropriated money for the purpose. Even when money has been permanently appropriated for payment of the Crown's judgment debts, expenditure for the purpose is sometimes also required to be authorized by an executive officer. But in any event, Parliament can always enact legislation withdrawing any authority it has previously given for expenditure and might expressly forbid payment of a particular judgment debt.

It is clear that no agreement entered into by the executive can have the effect of limiting Parliament's legislative power. The executive has no

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[55] "The Federation and Suits between Governments" *supra* n. 1.
[56] *Supra* n. 40 at 149.
[57] *New South Wales* v. *Bardolph* (1934) 52 C.L.R. 455.
[58] 246 U.S. 565 (1917).
[59] *New South Wales* v. *Commonwealth, supra* n. 53 at 186. In *Virginia* v. *West Virginia* it was argued that the issue of mandamus to compel levy of a tax would interfere with legislative discretion, (246 U.S. at 604) but the Court took the view that since the Constitution had subjected the States to the federal judicial power and since that power "essentially involves the right to enforce the results of its exertion," no objection could be made simply on the ground that enforcement might "operate upon the governmental powers of the State" (at 591, 600). No final decision was reached on the power to award mandamus and in the end West Virginia paid its debt voluntarily.

authority to extend or reduce the Parliament's powers and notwithstanding that the agreement it has made has been made with Parliament's authority or has been incorporated in a statute, subsequent parliamentary legislation incompatible with the terms of the agreement is valid (if otherwise made within the Parliament's legislative powers) and is also overriding. When a government does enter into an agreement and legislation is passed which makes it legally impossible for the agreement to be performed, the agreement is discharged.[60] The Parliament of a State might also enact legislation specifically absolving the Crown in right of the State from any legal liability which might have been incurred under an agreement with another State or with the Commonwealth, though whether this legislation would have the desired legal consequence would depend on the law applicable to the agreement.[61]

Having regard to the fact that legislative power and discretion cannot legally be fettered by agreement, and to the fact that a government may escape the legal consequences of breach of agreement and judgment against it by appropriate legislative action, a court might take the view that an agreement regarding the exercise of legislative power cannot be held legally ineffective on the ground that it purports to inhibit the exercise of those powers. On the other hand, a court might say that even if legislative power is unaffected by agreements regarding the manner of its exercise, and even if the legislative power extends to avoidance of the consequences of judgment, the mere fact that a government has to make a choice between legislating in accordance with the agreement and legislating contrary to it, with the attendant risk of being held liable to pay damages, cannot but inhibit the exercise of legal powers and, for that reason, the agreement ought not to be regarded as legally binding. This latter view seems to accord with the current trend of judicial thinking. Analogous problems have, of course, arisen in connection with agreements made by public authorities the terms of which control the exercise of the authorities' discretionary powers. The generally held view is that public authorities cannot be held liable for breach of agreement by reason of the exercise of powers which are discretionary. The assumption is that an agreement concerning the exercise of such powers is devoid of legal effect.[62]

It should be noted in conclusion that the enactment of legislation in derogation from inter-governmental agreements can be prevented by the presence of overriding constitutional provisions such as those in s. 105A of the Australian federal Constitution. Section 105A authorizes Commonwealth-State agreements "with respect to the public debts of the States". Such an agreement may be varied or rescinded by the parties but it is declared to be binding on the Commonwealth and party States notwithstanding the Constitution, State Constitutions or Commonwealth and State laws. The effect of this "is to make any agreement of the required description obligatory upon the Commonwealth and the States, to place its operation and efficacy beyond the control of any law of any of the seven Parliaments, and to prevent any constitutional principle or provision operating to defeat or diminish or condition the obligatory force of the Agreement".[63]

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[60] *Reilly* v. *The King* (1934) A.C. 176, 180. [61] See below p. 328 *et seq.*

[62] See *Rederiatiebolaget Amphitrite* v. *R.* (1921) 3 K.B. 500; *William Cory & Son* v. *London Corporation* (1951) 2 K.B. 476; *Commissioner of Crown Lands* v. *Page* (1960) 2 All E.R. 726.

[63] *New South Wales* v. *Commonwealth*, *supra* n. 53 at 177.

Liability

Section 75 of the federal Constitution invests the High Court with original jurisdiction but does not expressly subject Commonwealth or State governments to legal liability. Section 78 empowers the Commonwealth Parliament to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power". There have been differences of judicial opinion on whether s. 75 renders the Commonwealth and the States legally liable independently of any legislation under s. 78. In *The Commonwealth* v. *New South Wales*[64] Isaacs, Rich and Starke, JJ. interpreted s. 75 as subjecting States to liability to the Commonwealth and the Commonwealth to liability to States. Section 78, they said, merely gave power to confer rights to proceed which were not conferred by s. 75, for example rights to proceed in matters under s. 76 and to sue in other federal courts. To hold that the liability of one government to another depended on the enactment of legislation under s. 78 would mean that the Commonwealth could "render a State liable to the Commonwealth" but "refuse a reciprocal liability". It would also mean that the Commonwealth could "make one State liable to another, and leave that other irresponsible to the first. In short, there would be no certainty of equal and undiscriminating responsibility to obey the law or make reparation."[65] If s. 75 does impose liability, it follows of course, that legislation making either the Commonwealth or States immune from liability is invalid.[66]

Although this interpretation of s. 75 has been approved in several later cases,[67] its correctness has been questioned. In *Werrin* v. *The Commonwealth*,[68] Dixon, J. suggested that "the actual decision in *The Commonwealth* v. *New South Wales* may be justified and explained on either of two grounds, viz. (a) that the case came before the court upon a motion to set aside the writ for want of jurisdiction and, therefore, no question of substantive liability arose, but only a question whether the court had jurisdiction to entertain the suit and determine the question of liability, a jurisdiction which it clearly had under sec. 75; (b) that the State of New South Wales had by legislation abandoned the immunity of the Crown for liability in tort".[69] Dixon, J. thought that "probably the joint judgment of Isaacs, Rich and Starke, JJ. was not intended as a pronouncement that the liability of the State within Federal jurisdiction and of the Commonwealth was imposed directly by the Constitution so as to be unalterable and indestructible by legislation".[70] Like Higgins, J. in *The Commonwealth* v. *New South Wales*,[71] he preferred to treat s. 75 as a procedural or jurisdictional section which amongst other things overrode the principle that the Crown is immune from suit in tort but did not subject it to substantive liability.[72]

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[64] (1923) 32 C.L.R. 200.
[65] *Id.* 214.
[66] *Id.* 216. See *Musgrave* v. *Commonwealth* (1937) 57 C.L.R. 514, 546; *Werrin* v. *Commonwealth* (1938) 59 C.L.R. 150, 166.
[67] *New South Wales* v. *Commonwealth supra* n. 53 at 210-11, 215; *New South Wales* v. *Bardolph, supra* n. 57 at 458-59; *Heinmann* v. *Commonwealth* (1935) 54 C.L.R. 126 at 129; *Musgrave* v. *Commonwealth, supra* n. 66.
[68] *Supra* n. 66.
[69] *Id.* at 166.
[70] *Id.* 167.
[71] *Supra* n. 64 at 217. See also *Asiatic Steam Navigation Co. Ltd.* v. *The Commonwealth* (1956) 96 C.L.R. 397 at 416-17, 422-23, 424, 427.
[72] *Supra* n. 66 at 167-68.

The distinction between a rule which says that the Crown is immune from suit and a rule which says that the Crown is not legally liable for an act or omission which if done by a private person would create a cause of action, is a fine one. If, as Dixon, J. maintained, the effect of s. 75 is only to confer jurisdiction on the High Court and to deny States and the Commonwealth immunity from suit, the liability of either in a particular case will have to be determined with reference to law other than that contained in the Constitution. Although this interpretation of s. 75 does mean that there may be disparities between the law governing the liability of the Commonwealth and the States, I fail to see how the section can be construed as doing more than removing any immunity from suit that the Commonwealth and the States might otherwise claim and making the jurisdiction of the High Court obligatory. Section 75 does not refer to any body of law by which liability is to be determined, nor does it indicate whether the law applicable in determining liability is the law applicable between subject and subject. If it does go to the question of liability, its only effect can be to render the Commonwealth and the States liable according to law in force from time to time, which law may lay down rules of liability different from those applying between citizen and citizen.

As has been noted, s. 78 of the Constitution empowers the Commonwealth to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power". The laws the Parliament is empowered to pass in pursuance of this section include laws conferring rights on States to proceed against other States or the Commonwealth, laws conferring rights on the Commonwealth to proceed against States, laws conferring rights on private parties to proceed against the Commonwealth, and laws conferring rights on private persons to proceed against States of which they are not residents.

Section 56 of the Judiciary Act provides that actions in tort or contract against the Commonwealth may be brought in the High Court or the Supreme Court of the State or the Territory in which the cause of action arose. Section 57 provides that actions in which a State sues the Commonwealth in contract or tort may be brought in the High Court. Contract and tort actions between States may also be brought in the High Court (s. 59). When the Commonwealth is party to a suit, the rights of the parties are to be as near as possible the same as between subject and subject (s. 64). Sections 56 and 64 may be interpreted as legislative declarations that the Commonwealth is subject to substantive liability. Sections 57 and 59 seem to refer only to jurisdiction, but jurisdiction is already invested in the High Court by s. 75 of the Constitution. If these sections are to have any meaning they must also be construed as rendering the Commonwealth and States subject to liability one to the other.

A Commonwealth law which makes the Commonwealth liable in tort and contract and which provides that in suits to which the Commonwealth is party the rights of the parties shall be as near as possible those as between subject and subject, does not determine the law by which liability in a particular case shall be adjudged. Nor is the appropriate choice of law indicated by legislative provisions rendering States liable to States. The choice of law problems involved in suits between governments are particularly complex and require separate consideration.

The Governing Law

In *South Australia* v. *Victoria*[73] Griffith, C.J. stated that for a matter between States to be justiciable, it "must be such that a controversy between individual persons of a like nature could arise between individual persons and . . . can be determined on principles of law".[74] In the same case, Higgins, J. said it was the court's duty "to give relief as between States in cases where, if the facts had occurred between private persons, we could give relief on principles of law".[75] These remarks imply that those disputes between States that are justiciable can and ought to be decided according to the legal rules that would be applicable in like cases between private parties and that there is no body of rules peculiar to inter-governmental relations except presumably those affecting the exercise of political or governmental powers.

The Commonwealth Parliament has limited power to make laws dealing with relations between the governments of the federation. It has power under s. 51 (xxxix) to make laws with respect to matters incidental to the execution of powers vested by the Constitution in the Federal Judicature, and power under s. 78 to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power". No specific legislative provision has been made regarding the law to be applied in suits between States but s. 64 of the Judiciary Act provides that when the Commonwealth is party to a suit, (whether as plaintiff or defendant), the rights of the parties shall be as near as possible the same as between subject and subject. This section does not require a court to apply the law applicable as between subject and subject in every case, nor does it specify which system of law shall be applied.

In exercising its jurisdiction in disputes between the governments of the federation, the High Court must apply the rules of the legal system which is applicable according to the choice of law rules laid down in the Judiciary Act. The relevant sections of that Act are:

> 79. The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.
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> 80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

Sections 79 and 80 govern all aspects of federal jurisdiction including the original jurisdiction invested in the High Court by s. 75 of the Constitution and made exclusive by s. 38 of the Judiciary Act.

The High Court is a peripatetic court and sits in the States and the

[73] *Supra* n. 3.
[74] *Id.* 675.
[75] *Id.* 742.

Australian Capital Territory. Under s. 79 of the Judiciary Act, it is directed to apply the applicable law of the State in which it sits whenever the Constitution and Commonwealth law are silent. State law for the purpose of s. 79 comprehends State decisional law as well as State legislation, and includes State conflict of laws rules.[76]

Sections 79 and 80 may, it seems, apply to State suits against the Commonwealth notwithstanding that if the plaintiff were a private party, they would not apply. It has been suggested that when a private person sues the Commonwealth in tort, ss. 79 and 80 have no application since s. 56 of the Judiciary Act contains "within itself an implication that the law to be applied is the law of the State where the tort was committed and the cause of action arose".[77] This interpretation of s. 56 is strained and produces a number of anomalies. If the law to be applied in a private suit against the Commonwealth is the law of the State or territory in which the cause of action arose, presumably the law to be applied when the complaint is one of breach of contract is the law of the State or territory in which the alleged breach of the contract occurred, even though the parties agreed that the proper law of the contract should be the law of another State or territory. Section 57 of the Judiciary Act, which deals with actions in tort and contract brought by a State against the Commonwealth, allows actions to be brought in the High Court only and leaves no room for any implications to be drawn about the applicable law. Thus if Victoria sued the Commonwealth in respect of damage to State property in Victoria (say trespass to goods committed by Commonwealth defence forces) and the High Court tried the action in Sydney, the applicable law according to s. 79 of the Act would be that of the forum State, New South Wales, including its conflict of laws rules.

If the Commonwealth is defendant to a suit, whether it be brought by a State or by a private party, then according to s. 64 of the Judiciary Act, its liability is to be determined as if it were a subject. The effect of this section, coupled with that of ss. 79 and 80, is to render the Commonwealth liable under any relevant State statute law notwithstanding that as a matter of interpretation, the State statute does not apply to the Commonwealth and that the State is constitutionally incompetent to make the statute binding on the Commonwealth. A State Parliament is constitutionally incapable of enacting a law with respect to the Commonwealth or a Commonwealth instrumentality.[78] A State Parliament could not for example make a law with respect to contracts entered into by the Commonwealth Government, for this is a matter on which the Commonwealth Parliament's legislative power is exclusive. That Parliament also has exclusive power to make laws specifically dealing with Commonwealth liability and s. 64 of the Judiciary Act is such a law. As a matter of State law, a State statute, for example one dealing generally with damage done by aircraft, may apply to the Commonwealth,

[76] *Deputy Commissioner of Taxation* v. *Brown* (1958) 100 C.L.R. 32 at 39; *Suehle* v. *The Commonwealth* (1967) A.L.R. 572.

[77] See *Suehle's Case* (*per* Windeyer, J.); see also *Musgrave* v. *Commonwealth*, *supra* n. 66 at 547, 550, 551. Sec. 56 provides that actions in tort or contract against the Commonwealth may be brought in the High Court or the Supreme Court of the State or Territory in which the cause of action arose.

[78] *The Commonwealth v. Cigamatic Pty. Ltd.* (*In Liquidation*) (1962) 108 C.L.R. 372 at 377-78 (Dixon, C.J.).

but the Commonwealth Parliament may make such a law applicable to the Commonwealth as a matter of federal law. The combined effect of ss. 64, 79 and 80 of the Judiciary Act is that when State law is applied to the Commonwealth in any suit encompassed by s. 64, it is applied because federal law directs that it shall be applied.

Section 64, it should be noted, relates to all suits in tort and contract to which the Commonwealth is a party, including suits in which the other party is a State. But it does not require the rights of the parties to be those as between subject and subject in every particular; all it requires is that the rights of the parties shall be those as between subject and subject wherever possible. It may be argued that this qualification allows scope for the application of rules which are peculiar to governments. Are such rules rules of State or federal law? In *South Australia* v. *The Commonwealth*[79] Dixon, C.J. stated that regardless of how s. 64 of the Judiciary Act was interpreted — whether as a provision conferring substantive rights or as a provision limited to procedure — it was still necessary to go to ss. 79 and 80. But, he continued, it was one thing to find legislative authority for applying the law as between subject and subject to causes between governments, another to say how and with what effect the principles of that law apply in substance. The subject matters of public law and private law were, he said, different.

The case in question illustrates extremely well the difficulties created by ss. 64, 79 and 80 when applied to State suits against the Commonwealth. The agreement between South Australia and the Commonwealth, it will be recalled, was one for the construction of railways and South Australia sought a declaration that the Commonwealth had not fulfilled its part of the contract. Had the High Court chosen to regard the suit as if it were one between subject and subject, presumably it would have begun by considering the law of the forum State, including its conflict of laws rules, and if by the law of the forum the case was one to which conflict of laws rules applied, the Court would then have applied the law indicated by the appropriate State choice of law rule. Apart from the several remarks of Dixon, C.J. which have already been mentioned, none of the opinions in *South Australia* v. *The Commonwealth* advert to any choice of law problem. The legal principles applied are not expressly identified with the law of any one State nor are they expressly identified with the common law of England as modified by the statute law of the forum State. The principles applied did in fact include common law principles, those relating to the formation of legally binding agreements and those relating to inter-governmental agreements. The former are common to all Australian States and could therefore be treated as rules applied pursuant to ss. 79 and 80. But it would be difficult to characterize the principles regarding inter-governmental contracts as principles of State law. In the first place, State courts have no jurisdiction to entertain suits between a State and the Commonwealth and inasmuch as they lack jurisdiction in these cases, they are incapable of making decisional rules dealing with transactions giving rise to such suits. State law could not be applied to a Commonwealth-State agreement pursuant to ss. 64, 79 and 80 of the Judiciary Act unless the Court first held that the suit was one to which the law as between subject and subject applied. If it held that the law as between subject and subject could not reasonably or properly be applied, and that the governing

[79] *Supra* n. 40 at 140.

law was a special body of law applicable to inter-governmental agreements, the law it applied might conceivably be described as the common law of England referred to in s. 80 of the Judiciary Act, but it is probably more accurate to describe it as federal decisional or common law made by the High Court itself.

In adjudicating inter-governmental suits the United States Supreme Court has made it clear that the law it is applying is to a very large degree law of its own making. "Sitting, as it were, as an international, as well as a domestic tribunal," the Court observed in *Kansas* v. *Colorado*,[80] "we apply Federal law, State law, and international law, as the exigencies of the particular case may demand." In the exercise of its jurisdiction over controversies between States the Supreme Court has assumed law-making powers that are denied to Congress. "It does not follow . . .", it was said in a later phase of that litigation, "that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States."[81] Through successive disputes between States and decisions thereon, the Court "is practically building up what may not improperly be called interstate common law".[82]

In deciding a suit brought by Connecticut against Massachusetts in respect of diversion of water flowing in an interstate river, the Supreme Court declined to apply the common law relating to riparian rights even though the common law operated in both States. "The laws in respect of riparian rights that happen to be effective for the time being in both States," the Court said, "do not necessarily constitute a dependable guide or just basis for the decision of controversies" like the present.[83] The common law on riparian rights did not apply in all States and even when it did apply it could be changed.[84] "The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend on the same considerations and is not governed by the same rules of law that are applied in such States for the use of similar questions of private right. . . . And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in *Kansas* v. *Colorado* 206 U.S. 46, 100 . . . , such disputes are to be settled on the basis of equality of right. . . . It means that the principles of right and equity shall prevail having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system,' and that, upon a consideration of the pertinent laws of the contending States, and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters."[85]

There has been little discussion by the United States Supreme Court of the appropriate law to be applied to inter-governmental agreements entered into between States or between a State and the federal government. The United States Constitution, unlike the Australian federal Constitution, deals

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[80] *Supra* n. 16 at 146-47 (1901).
[81] *Kansas* v. *Colorado*, 206 U.S. 46, 95 (1907).
[82] *Id.* 98.
[83] *Connecticut* v. *Massachusetts* 282 U.S. 660, 670 (1931).
[84] *Ibid.*
[85] *Id.* 670-71. See also *Hinderlinder* v. *La Plata River and Cherry Creek D. Co.* 304 U.S. 92 (1937); *Arizona* v. *California* 373 U.S. 546 (1963).

expressly with interstate compacts and provides that such compacts shall not be made without the consent of Congress. Interstate compacts for this purpose do not include all interstate agreements. The Supreme Court has not gone so far as to say that State law may never affect the rights and obligations of parties to interstate agreements, but nor has it dismissed the possibility that these rights and obligations may fall to be determined, at least in part, by a federal common law. In *Kentucky* v. *Indiana*[86] suit was brought to restrain breach of a contract for the building of a bridge over the Ohio River and for specific performance of the agreement. Indiana did not contest the validity of the contract and expressed its willingness to perform if proceedings against it in the State Supreme Court were unsuccessful. Citizens and taxpayers of Indiana had sued in the State Supreme Court to restrain performance of the contract by Indiana. The United States Supreme Court held that Kentucky was entitled to the relief sought. In delivering the opinion of the Court, Hughes, C.J. said: "It can not be gainsaid that in a controversy with respect to a contract between States, as to which the original jurisdiction of this court is invoked, this court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either State, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this court to act as the final, constitutional arbiter in deciding the questions properly presented." If it were alleged that a State had impaired its contractual obligation, the Court would examine the validity of the contract.

It seems to be implicit in what Hughes, C.J. said that the State law may be relevant at least in determining whether a contractual obligation has come into being. The question was whether the Court should in the exercise of its original jurisdiction pass judgment on the effect of State law. In *West Virginia ex rel. Dyer* v. *Sims*[87] the Supreme Court reversed a State court judgment that an interstate compact entered into by West Virginia violated the State Constituion. According to Frankfurter, J. the Supreme Court was "free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States".[88] Reed, J., on the other hand, justified the Court's interpretation of State law on the basis of federal participation in interstate compacts.[89]

In the Australian federal context, the scope for application of federal common law in the adjudication of intergovernmental disputes is probably very limited. In enacting ss. 79 and 80 of the Judiciary Act, the Commonwealth Parliament has probably attempted to be exhaustive in its declaration of the sources of law to be applied in the exercise of federal jurisdiction, but if State law is to be the governing law, it must, according to s. 79, be applicable. The operation of the common law of England under s. 80 is subject to the same qualification. When federal common law is applied, it can only be applied because the Court has found that there is no other applicable law within the meaning of ss. 79 and 80, and such a finding will depend on whether the Court considers the case before it so different from cases

[86] 281 U.S. 163 (1929).
[87] 341 U.S. 22 (1951).
[88] *Id.* 128.
[89] See also Opinion of Jackson, J.

between subject and subject and Crown and subject as to take it outside the law applicable in those cases. Because State courts have no jurisdiction to entertain disputes between the governments of the federation, State legal systems must be very incomplete repositories of legal principles appropriate to the regulation of inter-government relations, particularly when the relationships are not of a kind that can be dealt with satisfactorily by use of private law analogies. Some inter-governmental agreements, to take but one example, are more akin to international treaties and executive agreements than to contracts between citizens, or between governments and citizens. In the *Rail Standardization Case*, the judges of the High Court drew upon common law principles regarding the formation of contracts, but some of them also recognized that the agreement was not one the effect of which could be determined solely by reference to the ordinary rules of contract law. To treat inter-governmental agreements which cannot be easily accommodated within the framework of contract law as "political", "not legally binding" and as "non-justiciable" is to ignore the not inconsiderable experience of international tribunals in the declaration of rights and obligations under treaties and executive agreements and the uses of international law analogies.[90]

International law may also be of assistance in settling disputes over territorial limits. The territorial limits of the States are defined either by Acts of the Imperial Parliament or by Letters Patent made thereunder, but these instruments do not always define the boundaries precisely or establish clear directives on how they shall be ascertained. The inadequacy of these legislative delineations and the consequent necessity to determine boundaries by reference to other rules is particularly well illustrated by the Pental Island dispute between New South Wales and Victoria in 1872.

The island was situated in the River Murray. When the Port Phillip district of New South Wales was constituted as the colony of Victoria in 1851, the boundary between New South Wales and Victoria was defined as follows: "on the north and north-east by a straight line drawn from Cape Howe to the nearest source of the River Murray, and thence by the course of that river to the western boundary of the Colony of South Australia" (13 & 14 Vic., c. 59). The same definition had been used in 1842 to define the northern boundary of the Port Phillip electoral district (5 & 6 Vic., c. 76). Following the opening of the river to navigation, the question arose whether all the channels of the river formed part of New South Wales. The matter was sought to be resolved by a further Imperial enactment (18 & 19 Vic., c. 54, Sched. s. 5) providing "that the whole of the watercourse of the . . . River Murray, from its source therein described to the eastern boundary of the Colony of South Australia, is and shall be within the territory of New South Wales". Both New South Wales and Victoria exercised governmental authority over the island and disposed of island land as if it were part of their respective territories, though Victoria had exercised this authority first. Both colonies agreed to submit the dispute to the King in Council and in 1871 the dispute was referred to the Judicial Committee. In 1872 the Committee advised that the island ought to be awarded and declared to be part of the territory of Victoria, which advice

[90] See *Serbian Loans Case* (1929) P.C.I.J. Ser. A, No. 20; *Norwegian Loans Case* (1957) I.C.J. 9; *Abu Dhabi Arbitration* (1951) 18 I.L.R. 144; *Aramco Arbitration* (1958) 27 I.L.R. 117.

was adopted by Order in Council.[91]

The Judicial Committee did not give reasons for its opinion, but since it advised in favour of Victoria it may be presumed that it accepted the Victorian contentions, or some of them. Victoria alleged that the southern channel was not the River Murray, but a continuation of the River Loddon which flowed in from Victoria and ran into the southern channel two or three miles from the southern end of Pental Island. The Act 18 & 19 Vic. c. 54, it was argued, did no more than make the bed of the River Murray part of New South Wales, and since the southern channel was really the River Loddon, the Act did not divest Victoria of its territorial right over the bed. Victoria further contended that even if both streams around the island formed part of the watercourse of the River Murray, the Act of 1855 would not transfer the island which was not itself a watercourse. Reference was also made to the facts of occupation.[92]

Harrison Moore stated that it was the clear opinion of the Judicial Committee that, but for the Act of 1855, "the dividing line would have been the *medium filum*, and that the Act did alter the boundary. It is", he added, "tolerably clear that they accepted the doctrine of the *Thalweg*, so that the northern as the deeper channel would have been the dividing stream even on the assumption that the southern channel was part of the Murray".[93] If that was the case, the Judicial Committee must have taken the view that in the absence of applicable Imperial legislation, the river boundaries between colonies should be determined according to the rules of international law. International law has been applied in similar circumstances by the United States Supreme Court.[94]

For the sake of completeness, mention should also be made of the High Court's decision in *South Australia* v. *Victoria*.[95] In this case, the High Court and on appeal, the Privy Council, found it possible to decide a boundary dispute simply by applying common law principles regarding the interpretation of legislation and the authority of colonial Governors. No attempt was made to identify the law applied with the law of a particular State.

Federal Legislation

By enacting ss. 79 and 80 of the Judiciary Act, the Commonwealth Parliament has purported to make laws respecting the choice of governing law by courts exercising federal jurisdiction. By enacting s. 64 of the same Act, it has purported to equate the rights and liabilities of the Commonwealth in certain circumstances with those of subjects. If, as has been suggested, the provisions of the Judiciary Act do not direct the High Court to applicable State law or English common law in every case in which the matter before it is one between States or between the Commonwealth and a State or States, and if in adjudicating such matters the Court is not

[91] See Despatch from the Secretary of State for the Colonies to the Governor of New South Wales, Aug. 21, 1872 (1, *Votes and Proceedings of the Legislative Council of New South Wales*, 1872-3, 519-20); Despatch from the Secretary of State for the Colonies to the Governor of Victoria, Aug. 21, 1872 (*Votes and Proceedings of the Legislative Assembly*, 1871, Paper B, 15).

[92] See W. Harrison Moore, "The Case of Pental Island" (1904) 20 *L.Q.R.* 236; F. W. S. Cumbrae-Stewart, "Australian Boundaries" (1965) 5 *Univ. of Queensland L.J.* 1 at 6-10.

[93] Harrison Moore, *supra* last n. at 242-43.

[94] See *New Jersey* v. *Delaware* 291 U.S. 361 (1934) and cases cited therein.

[95] *Supra* n. 3 and on appeal (1914) 18 C.L.R. 115, (1914) A.C. 283.

prevented from applying federal common law, the question then arises whether the Commonwealth Parliament has power to say what the law to be applied in adjudication of this limited class of disputes shall be.

There are two relevant heads of legislative power. One is s. 78 which empowers the Commonwealth Parliament to pass laws conferring rights to proceed against the Commonwealth and the States. The other is s. 51(xxxix) which empowers the Parliament to make laws with respect to any matter incidental to the judicial and other powers vested by the Constitution. It cannot be stated with any confidence precisely what law-making authority s. 78 confers. Standing alone the section seems to imply that but for federal legislation no proceedings against the Commonwealth or States might be brought in courts of federal jurisdiction. But s. 75 of the Constitution removes any immunity from suit which the Commonwealth and the States would otherwise have enjoyed. Section 78 probably means then that the Parliament may make laws respecting the liability of the Commonwealth and the States when sued in courts of federal jurisdiction. Certainly it would seem to authorize the making of laws such as s. 64 of the Judiciary Act and the enactment of a statute of limitations apply to suits in federal courts.[96]

Whether substantive law to govern disputes between the governments of the federation could be made pursuant to the incidental legislative power is arguable. Some years ago, P. D. Phillips ventured the opinion that "there is no general power in the Commonwealth Parliament to prescribe the law to be applied by courts exercising Federal jurisdiction".[97] He also doubted whether there was any general legislative power "to prescribe by reference or incorporation or otherwise the law applicable to substantive issues".[98] In his view, federal legislation prescribing the law to be applied was valid only if made in exercise of specific grants of legislative power. Such was his interpretation of the extent of federal legislative power that he questioned even the validity of a federal Act directing a court of federal jurisdiction to apply the conflict of laws rules of the forum State or of any other State. Though he conceded that a court of federal jurisdiction must in some situations select the *lex causae* according to choice of law rules, he regarded the selection of the appropriate *lex causae* as a function of the court. It was, he said, "part of the very purpose of the constitutional grant of the jurisdiction".[99] Although I agree that power to select the *lex causae* may be implied in a grant of federal jurisdiction, I think that the assertion that the Commonwealth Parliament is devoid of power to direct a court of federal jurisdiction to apply the law of the forum State rests on an altogether too restricted interpretation of the incidental legislative power. It is possible that had the framers of the Constitution been more aware of the kinds of problems that would be raised by the exercise of federal jurisdiction, the grant of power to the legislature to make provision for the incidentals to the exercise of the jurisdiction would have been more specific. But I can see no reason for interpreting the incidental power so restrictively that the legislature could not, for example, "amend" the decisional rules laid down by the High Court in the exercise of its implied power to select the *lex causae*. If ss. 79 and 80 of the Judiciary Act are valid, why should the Commonwealth Parliament

[96] See *Werrin* v. *Commonwealth*, *supra* n. 66 at 167; *Commonwealth* v. *New South Wales*, *supra* n. 64 at 216.
[97] "Choice of Law in Federal Jurisdiction" (1961-62) 3 *Melb. U.L.R.* 170 at 187.
[98] *Id.* 353.
[99] *Id.* 360.

not be held to have power to enact different choice of law rules for different matters? Why, for example, should not the Parliament be able to direct the High Court that in the exercise of its original and exclusive jurisdiction in matters between States and between the Commonwealth and a State or States, it may, subject to ss. 79 and 80 of the Judiciary Act, apply, say, general principles of law recognized by civilized nations? Whether it is desirable to have legislative direction on the choice of law governing disputes between governments is another question. To my mind, little would be gained by attempting to control the High Court's choice of law in these matters. So long as the Court itself recognizes that in deciding disputes between the governments of the federation, it may in some instances need to decide according to principles drawn from other legal orders in which similar disputes have arisen for judicial determination, legislative intervention is quite unnecessary.